IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MOHAMED H ABUSHAR Claimant **MAINSTREAM LIVING INC** Employer	**APPEAL 18A-UI-05063-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/15/18** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 27, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 17, 2018. Claimant participated. Employer participated through Trudy Luetters, Program Coordinator; Holly Fitch, Assistant Team Lead and (representative) Marcanne Lynch, human resources manager. Claimant's Exhibit A was admitted into the record. Employer's Exhibits 1 through 6 were admitted into the record.

ISSUE:

Did the claimant voluntarily quit his employment or was he discharged due to job-connected misconduct sufficient to disqualify him from receipt of unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a direct support professional beginning on January 27, 2014 through March 21, 2018, when he voluntarily quit his employment.

The claimant worked the first four years of his employment as a full-time employee. Full-time employees are given a generally set work schedule at a set work location. Claimant worked primarily at the Knapp house location and worked from Tuesday through Friday from 2:00 p.m. to 10:00 p.m. or 3:00 p.m. to 11:00 p.m. and every other Saturday. Under the employer's policies, a copy of which had been given to the claimant, a full-time employee is guaranteed thirty-five hours per week. A part-time employee is given up to thirty hours per week. No part-time employee is guaranteed any set hours or set work schedule or set work location.

Effective December 4, 2017, the claimant asked his direct supervisor Holly Fitch if he could move from a full-time employee to a part-time employee. The claimant told Ms. Fitch he was going to attend barber school beginning December 6 and he would be in school from 8:30 a.m. until 4:30 p.m. Monday through Friday so he would no longer be able to work his scheduled full-time hours. No one from the employer suggested or required the claimant move from a full-time

employee to a part-time employee. Ms. Fitch explained to the claimant that he would lose some benefits including insurance and vacation if he became a part-time employee. She also explained how part-time employees were scheduled on a first-come first-served basis. The employer does not schedule part-time employees according to any seniority basis based on length of employment. The claimant willingly signed the personnel action form requesting he be moved to a part-time status.

At the end of each month the work schedule for the following month is sent to all part-time employees via e-mail. The schedule shows which shifts are open for part-time employees to pick up to work. The employer regularly fills most shifts with full-time employees only sending what shifts are open to part-time employees. Once part-time employees receive the e-mail listing open shifts, they are expected to contact the supervisor to ask for an open shift to be assigned to them. All part-time employees are scheduled in the manner described above and have been since at least September 2016. Part-time employees can sign up for any number of shifts at any of the work locations. The part-time employee who asks for the shift first is given the shift. No preference is given to length of service in scheduling part-time employees.

Claimant last worked on January 29, 2018. During his shift, Ms. Fitch talked to him about what hours would be open in February. The claimant was angry and upset that he could not be given a set part-time schedule and insisted he should be given first pick of all open hours as he had been an employee longer than others. Ms. Fitch explained to him that scheduling for part-time employees was not done on a seniority basis. She told claimant that he would have to be the first person to ask for an open shift when the e-mail was sent to him. The claimant was not happy with Ms. Fitch's explanation and told her he would need to solve his problem with the office. Ms. Fitch notified Ms. Lynch about what had occurred.

Ms. Lynch was home caring for her children on January 29 when at 8:48 p.m. the claimant called her to complain about how Ms. Fitch was scheduling part-time employees. As it was 8:48 p.m. and Ms. Lynch was busy putting her children to bed, she asked the claimant to call her the next day to discuss his issues. The claimant did not call Ms. Lynch on January 30, so on January 31, Ms. Lynch sent the claimant a text asking if he still wanted to meet with her to discuss his issues with scheduling part-time employees. The claimant never responded to Ms. Lynch's text message.

The claimant had signed up to work on February 12 from 3:00 p.m. to 11:00 p.m. He sent a text message to Ms. Fitch at 8:46 a.m. telling her that he had an emergency and would need to drive to Nebraska, so he would only be able to work until 10:00 p.m. At 1:03 p.m. he sent another text message saying he could not work at all because he had to leave for Nebraska. Ms. Fitch was able to find someone to work for the claimant after he was unable to do so. The employer considered claimant's absence on February 12 properly reported and excused. (At hearing the claimant reported that he had called Ms. Fitch to tell her he was too sick to work that day.)

There were other open shifts in the part-time schedule during the month of February that the claimant could have worked if he chose to do so. Claimant did not sign up for any other shifts in the month of February.

On February 22, Ms. Fitch sent out the part-time work schedule for March via e-mail. Ms. Fitch also texted the claimant at the same time telling him the March schedule was out and to let her know if he wanted any shifts. On February 23, the claimant responded to her text message with a text message of his own indicating that he wanted to work the 3:00 p.m. to 10:00 p.m. shift on both March 5 and March 19. The claimant was given both shifts he requested.

The claimant did not report for his shift on March 5. At 3:09 p.m. Ms. Fitch called him to see if he was coming to work. The claimant did not answer his telephone, so she left him a voice mail message to call her. Claimant never returned her call. At 3:11 p.m. Ms. Fitch sent the claimant a text asking if he was coming to work. He did not respond to her text message.

On March 12 at 1:53 p.m., Ms. Fitch sent the claimant a text asking him if he would be available to work that night from 3:00 p.m. to 10:00 p.m. The claimant responded at 1:53 p.m. telling her no he could not work.

On March 15 at 3:38 p.m., Ms. Fitch sent the claimant a text asking him if was going to work his shift that he had signed up for on March 19, 2018. The claimant did not respond to her text. On March 19, the claimant was to be to work at 3:00 p.m. He did not call prior to his shift start time to report he would be absent, nor did he show up for his work shift. At 3:06 p.m. Ms. Fitch called the claimant to see why he was not at work. He did not answer his telephone and the voicemail Ms. Fitch left him went unanswered. At 3:08 p.m. Ms. Fitch sent the claimant a text message asking him to call her. He did not respond to her text message.

Ms. Fitch reported to Ms. Lynch what had occurred. By March 21, the claimant had not worked since January 29 and had been a no-call/no-show for two shifts and called in with an emergency that required he drive to Nebraska for a third shift.

On March 21, the claimant was sent a letter telling him that because he had not worked at least one shift during each pay period and because he had been a no-call/no-show for his last two work shifts, his employment was ending. The letter told the claimant that if he thought there was any error in the information that he could call Ms. Lynch with questions or concerns. The claimant never called Ms. Lynch after receiving the letter of March 21.

In November 2017, Ms. Fitch backed into the claimant's car in the parking lot damaging his bumper. She reported the accident to her insurance company which paid for all of the repairs to the claimant's car.

REASONING AND CONCLUSIONS OF LAW:

This case can be decided either as a voluntary quit or as a discharge. For the reasons that follow, the administrative law judge concludes whether analyzed a voluntarily quit or as a discharge, the claimant's separation from this employer is disqualifying and unemployment insurance benefits are denied.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, Id. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, Id.

The claimant was not as credible a witness as Ms. Fitch and Ms. Lynch. The claimant's testimony was unsupported by any other evidence and inconsistent. The employer's evidence was supported by business records made at the time of the occurrence of events.

The claimant's allegation that Ms. Fitch and others conspired to get him to quit is simply not believable. Ms. Fitch went beyond what was required of her to accommodate the claimant's scheduling when he voluntarily chose to become a part-time employee. The employer was under no obligation to schedule according to seniority despite the claimant's desire that they do so. The claimant's argument that Ms. Fitch wanted to get rid of him because of the fender bender in the parking lot before he even became a part-time employee is also not believable. The claimant simply wanted to be scheduled according to his desires and when the employer would not do so, he chose to quit by failing to communicate with the employer or show up for work.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(26) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (26) The claimant left to go to school.

Iowa Admin. Code r. 871-24.25(27) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (27) The claimant left rather than perform the assigned work as instructed.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). A voluntary leaving of employment requires an intention to

terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

The claimant voluntarily chose to reduce from a full-time to a part-time employee so he could attend barber school. The employer did not force him into becoming a part-time employee, he chose to do so. The employer was under no obligation to schedule the claimant as a part-time employee based on his seniority. It is perfectly legal for an employer to schedule employees on a first-come first-serve basis. The claimant was simply angry that the employer would not grant him special scheduling, so he refused to work and stopped communicating with the employer. The claimant had the ability to communicate with the employer and to properly report absences as he had done so in the past. He had also in the past promptly responded to text messages when he chose to do so. Under these circumstances, the claimant being a no-call/no-show for the only two shifts he was to work in March, his failure to work at all in February, his failure to follow up with Ms. Lynch on his alleged complaints about scheduling in January and his failure to respond to the letter of March 21, the administrative law judge considers the claimant clearly demonstrated this intention to quit his employment. The claimant voluntarily quit his employment without good cause attributable to the employer and benefits are denied.

For the reasons that follow, the administrative law judge concludes that under a discharge analysis, the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant simply stopped communicating with the employer, stopped reporting his absences or showing up for work when the employer would not grant him scheduling as he wanted. The claimant was given a reminder that he had signed up to work and he still did not call or show up for work. The employer provides services to dependent adults who cannot be left alone. The claimant's failure to show up for work or even provide notice that he would not be at work, leaves the employer needing to find a replacement or requiring other employees to work double shifts. The claimant's actions are sufficient misconduct to disqualify him from receipt of unemployment insurance benefits. Benefits are denied.

DECISION:

The April 27, 2018, (reference 01) decision is affirmed. The claimant voluntarily quit his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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